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IN THE

Supreme Court of the United States

October Term, 1951

No. 442

EUGENE M. BRUNNER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY BRIEF.

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ARGUMENT.

We respectfully submit that the Government has failed to demonstrate any basis for rejecting petitioner's claim of privilege.

In the same breath it admits the possibility of prosecution, but adopts the conclusions of the Circuit Judge and asserts that prosecution is unlikely.

The Government urges repeatedly that the answers sought from Brunner would have little *probative weight* when the question at issue is *admissibility*. As we will show, and as the Government must confess, this argument is in direct contradiction to the position it has asserted, and is asserting successfully, in past and current Smith Act

prosecutions. That the *Dennis*[1] defendants are in prison today would seem to be answer enough.

The Government dwells at length on principles of law which are not now the law. Certainly it is not the law that petitioner must show his answers would disclose "facts which constitute a crime," a "basis for conviction," a "punishable offense," a "necessary and essential part of any crime" or involvement in "leadership and conspiratorial activities." As we will demonstrate, the Government is urging today, but elsewhere, that mere Communist Party membership is evidence of crime. Indeed, the position of the Government in current Smith Act prosecutions would justify, absent any showing, the assertion that the two answers sought would rise far above the dignity of mere "links in a chain." The U. S. Attorney's office would eagerly allege membership and attendance at meetings as overt acts in support of conspiracy indictments.

The argument that petitioner was not the object of "hot pursuit" ignores the record as well as the facts of present day life. The Government argues, in effect, that because the Department of Justice announced its intention of prosecuting 12,000 Americans as individuals, Brunner had no right to anticipate that he would be one of those selected. We respectfully submit that conjecture of this sort is even less of a substitute for the Fifth Amendment than the assurances extended to petitioner by the District Judge, or the promises of the U. S. Attorney's office in the *Kasinowitz*,[3] *Alexander*[3] and *Healey*[4] cases. That Brunner might be one of those whose projected prosecution would be screened out is no argument for the surrender of his constitutional rights.

Nor is there any validity to the argument that the setting in which Brunner was interrogated was "controlled"; that

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[1] *Dennis* v. *U. S.*, 341 U. S. 494.
[3] *Kasinowitz* v. *U. S.*, 181 F. (2) 632.
[3] *Alexander* v. *U. S.*, 181 F. (2) 480.
[4] *Healey* v. *U. S.*, 186 F. (2) 164.

the issues raised by the Weinbaum indictment should have persuaded Brunner that after he had admitted membership and Party activity prior to 1940, the Government would have forthwith excused him from the witness stand. This rationale is likewise no substitute for the Fifth Amendment.

It is also suggested that this Court should disregard the *Zwillman*[5] and *Rosen*[6] cases as peculiar to the Second Circuit, as *probably erroneous*. We can only answer that this Court has regarded these opinions, written respectively by Justices A. Hand and Chase, with approval. Nor is it proper, in the light of the *Blau*,[7] *Hoffman*,[8] *Zwillman* and *Rosen* opinions to suggest that petitioner's case must be distinguished because the answers sought related to a period too remote to justify any fear. Indeed, on the face of it, and in the light of matters hereinbelow set forth, petitioner had a great deal more to fear than Hoffman, Zwillman or Rosen. The relentless pursuit of Communists on the current political scene is a well advertised fact. Every literate American must be aware of it. Contending, as it is before other tribunals, for the admissibility of the very type of evidence which it blows down in this case, the argument of the Government bespeaks a casual regard for the dignity to which a long line of cases has elevated the Fifth Amendment.

Recent pronouncements of this Court lend further weight to Petitioner's claim that the questions asked placed him in real peril. In *Carlson* v. *Landon*, 343 U. S. ——, No. 35, October Term 1951 (Decided March 10, 1952—Opinion by Justice Reed) the Court observed (pp. 10-11):

> We have no doubt that the doctrines and practices of communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien communists

[5] *Zwillman* v. *U. S.*, 108 F. (2) 802.

[6] *Rosen* v. *U. S.*, 174 F. (2) 187.

[7] (*Patricia*) *Blau* v. *U. S.*, 340 U. S. 332.

[8] *Hoffman* v. *U. S.*, 341 U. S. 479.

> under its power to regulate the exclusion, admission and expulsion of aliens. (See also footnote 21 at bottom of page 10, slip opinion).

And in *Harisiades* v. *Shaughnessy*, No. 43, October Term 1951, (opinion by Justice Jackson):

> "Under the conditions which produced this Act can we declare that Congressional alarm about a coalition of Communist power without, and Communist conspiracy within the United States, is either a fantasy or a pretense?

As objective proof that the Government's argument is in diametric opposition to its official position we direct the attention of the Court to the following matters:

A. The Governmen's brief in the Bail cases.

In *Stack et al.* v. *Boyle*, 342 U. S. 1 (October Term 1951 No. 400), the Government, in arguing that bail of $50,000 was not excessive in Smith Act indictments, urged as a contributing factor that all of the defendants had for a considerable period of time been engaged in Communist Party activities. The following statements are from the brief, pages 19, 20. (Italics ours)

> Petitioner Kusnitz, who was born in Russia, *has been engaged in Communist Party activities since 1929.*
>
> Petitioner Yates, *who has been a member of the Communist Party since 1933,* is now State Secretary of the Communist Party of California.
>
> Petitioner Steinberg, *who has been a member of the Communist Party since 1937,* is Legislative Director of the Los Angeles County Communist Party.
>
> Petitioner Lima, *who has been engaged in Communist Party activities since 1937,* is East Bay Regional Chairman of the Communist Party at San Francisco.

It is a reasonable assumption that this data was not idly included; that the alleged Communist activities of these de-

fendants dating back respectively to 1929, to 1933, to 1937, made them bad risks; that their Communist Party activities argued a conspiracy which came into being long before 1940; that this protracted activity made them *worse* risks, and therefore entitled only to the minimum benefits of the presumption of innocence.

B. The Government's brief in the Dennis case 183 F. (2) 201 (CCA 2).

In its brief filed in the Second Circuit, the Government placed strong reliance, with the approval of the Court, upon evidence of membership and activity ante-dating enactment of the Smith Act. Portions of that brief are herein included as petitioner's Appendix "A."

C. Official publicity releases by the Attorney General and the Director of the Federal Bureau of Investigation.

In connection with the arrests of defendant presently on trial in Los Angeles, and those shortly to be on trial in New York, coincidentally with the arrests the United States Department of Justice, on its official letterhead, under the authorized signature of Attorney General J. Howard McGrath and the Director of the Federal Bureau of Investigation J. Edgar Hoover, announced the filing of complaints in Los Angeles and New York. In each instance the announcements were accompanied by biographical data on each of the defendants with pointed reference to their Communist Party membership and activities dating back as far as 1922.

Excerpts from three such releases are herein included as Appendices B, C and D.[9]

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[9] True copies of these releases, together with true copies of the Los Angeles documents excerpted in Appendices E, F and G are being deposited with the clerk of the Supreme Court contemporaneously with the filing of this brief.

D. Testimony on the current Los Angeles trial.[10]

Excerpts from this proceeding are herein included as Appendix E.

E. Brief of the Government in the Los Angeles case (*U. S.* v. *Schneiderman et al., supra*).

Excerpts from this document are included herein as Appendix F. That the Government would in a prosecution regard the answers sought from petitioner as admissible, is here made abundantly clear.

F. Oral argument of the Government in the Los Angeles case (*U. S. Schneiderman, et al., supra*).

Incorporated herein as Appendix G are excerpts from the argument of Government counsel (pages 3467 to 3500), Official Transcript, Vol. 25—March 19, 1952.

The Fifth Amendment was designed to prevent the witness from ever being accused or tried on evidence obtained from his own mouth by compulsion.

It does not exist in a vacuum, and this Court repeatedly has resisted any attempts to water down its meaning. It is a "fighting clause" and is valid only "when insisted upon by a belligerant claimant in person." It "is neither accorded to the passive resistant nor to the person ignorant of, or indifferent to, his rights."[11]

> Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. (*Watts* v. *Indiana*, 338 U. S. 49)
>
> Men now in concentration camps could speak to the value of such a privilege, if it were or had been theirs. There is in it the wisdom of centuries, if not that of

[10] *U. S.* v. *Schneiderman et al.*, No. 22131-Criminal, U. S. District Court, Southern District of California, Central Division.

[11] *U. S.* v. *Johnson*, 76 F. Supp. 538 (1947).

> decades. . . . [The Court] cannot be partner or partisan with the prosecutor, subtly or otherwise, and retain the confidence of the accused and the public or its own self-respect. . . . In our system the accused is not such [a criminal] until the jury pronounces 'guilty.' Until then the Court, whether magistrate or trier of ultimate fact, should not extract the word from him or permit its use against him for conviction when it or another court has done so. The privilege still stands guard when so much is attempted by inquisition, however subtle, at any stage of the proceedings, preliminary or otherwise. Rutledge, J., from the court, in *Wood* v. *United States* (App. D. C. 1942), 128 F. 2d 265, 278-9).

It will not do to urge, nor do we believe this Court will be persuaded, that the privilege against self-incrimination, a constitutional barrier for many generations against unlawful inquisition, can only be exercised by its surrender. The privilege operates neither automatically nor by indirection. The witness, as did the petitioner here, must *assert* it, and this Court, recognizing that it originates from early struggles against enforced conformity and the search for heretics and dissenters, must vigorously *reassert* it.

A logical extension of the Government position in this case would place every American at the mercy of the first prosecutor who cails him to the witness stand and asks him abont his past Communist connections, real or imaginary. The witness would have two choices and only two: either summary jailing for contempt, or the formidable prospect of prosecution for transgressing the provisions of the Smith Act or the conspiracy statutes. It is not too much to suggest that under these circumstances the Fifth Amendment will have been more than watered down—it will have been erased.

CONCLUSION.

The conviction of petitioner should be reversed.

Respectfully submitted,

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APPENDIX "A"

From Brief of the Government in *Dennis* v. *U. S., supra,* page 371 (CCA-2):

> "Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the Party's program. The conspiracy principle has traditionally been employed to protect society against all 'ganging up' or concerted action in violation of its laws. No term passes that this Court does not sustain convictions based on that doctrine for violations of the antitrust laws or other statutes. However, there has recently entered the dialectic of politics a cliche used to condemn application of the conspiracy principle to Communists. 'Guilt by association' is an epithet frequently used and little explained, except that it is generally accompanied by another slogan, 'guilt is personal.' *Of course it is; but personal guilt may be incurred by joining a conspiracy. That act of association makes one responsible for the acts of others committed in pursuance of the association.* It is wholly a question of the sufficiency of evidence of association to imply conspiracy. There is certainly sufficient evidence that all members owe allegiance to every detail of the Communist Party program and have assumed a duty actively to help execute it, so that Congress would, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the Party. [Emphasis supplied.]
>
> *CIO* v. *Douds,* 70 Sup. Ct. 674.

"The quoted language is simply an application of the accepted principle that conspiracy is a partnership in criminal purposes, and that declarations of a conspirator in furtherance of the conspiracy are admissible against [372] all of the conspirators."

• • • • • • • • • •

[372] "It is unnecessary to show that the conspirator knew the full scope of the conspiracy or participated in carrying out each detail."

• • • • • • • • • • •

[373] "On the basis of the foregoing, it is clear, we submit, that there was no error in the admission of evidence relating to statements by subordinate officials of the Party and those working with them in execution of appellants' decisions."

• • • • • • • • • • •

[375] "The authorities support the admissibility of proof far beyond that of which appellants complain here (Br. 326-332). In *Standard Oil Co.* v. *United States*, 221 U. S. 1, the Supreme Court held (221 U. S. at 46-47) that it was proper to give consideration to the defendants' acts prior to the passage of the Sherman Act in so far as such evidence 'tended to throw light upon the acts done after the passage of the Anti-Trust Act.' Thus, acts occurring as far back as 1870 were properly considered, even though the statute involved was passed in 1890. See also *United States* v. *Reading Co.*, 253 U. S. 26 (events dating from 1871 relating to anthracite coal tonnage admitted); *United States* v. *E. I. duPont de Nemours & Co.*, 188 Fed. 127 (C. C. D. Del.) (considered facts of explosive industry from 1872); *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.) (facts from 1858 relating to Pullman business considered).

"Similarly, in *Eagan* v. *United States*, 137 F. 2d 369 (C. A. 8), involving a conspiracy to violate the Public Utility Holding Company Act, it was held that acts prior [376] to the time when the act became applicable to the defendant corporation were admissible. The court stated (pp. 381-382):

> "The indictment charged a conspiracy not barred by the statute of limitations. The evidence tended to show that the conspiracy was on foot long before February 25, 1937, the date on which the Act became applicable to the defendant corporation, and it continued after that date. * * * It was permissible, however, to prove

> the acts of the earlier dates. They tended to show the existence of the conspiracy and the intent of the conspirators. * * *

"The admissibility of evidence prior to the indictment period but during the statutory period naturally follows. In *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, pre-1929 evidence (including that prior to 1919) was held admissible with reference to a 1929 combination many of whose members were non-existent in 1919. This evidence tended to show the "existence of a continuing combination among respondents to utilize the basing point pricing system." (333 U. S. at 704.) On this point the Court stated (333 U. S. at 704-705):

> "The Commission did not make its findings of post-1929 combination, in whole or in part, on the premise that any of the respondents' pre-1929 or NRA code activities were illegal. The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.

[377] "In *Heike* v. *United States*, 227 U. S. 131, the Supreme Court in referring to proof of acts prior to the indictment stated (227 U. S. at 145):

> "The longer it had lasted the greater the probability that he knew of it and that his acts that helped it were done with knowledge of their effect.

"In addition, it is the well established rule that in a situation in which conspiracy is alleged, the acts of the group (or in this case the Party) are admissible, as well as the acts of the individual conspirators. In *United States* v. *Pelley*, 132 F. 2d 170 (C. A. 7), certiorari denied, 318 U. S. 764, evidence relating to the National Silver Shirt organization was admitted, as were the acts of the individuals.

This, too, was before the passage of the act on which the indictment was based. Similarly, in *Haywood* v. *United States*, 268 Fed. 795 (C. A. 7), certiorari denied, 256 U. S. 689, involving a conviction for conspiracy to violate sundry laws of the United States, such as the Selective Service Act (World War I), the Espionage Act, etc., the court stated (page 807):

> "Evidence of the organization of the I. W. W., the defendants' control, and the methods of operation through correspondence, pamphlets and official newspapers, was competent, though ante-dating the laws in question, as bearing on defendants' possession and knowledge of the use of the means by which these felonies could be committed.

"This same approach was taken and the same type of group evidence admitted in *Dunne* v. *United States*, 138 F. 2d 137 (C. A. 8), certiorari denied, 320 U. S. 790.

[378] "Thus, in the instant case, the pre-statute and pre-indictment activities of the individual conspirators outlined the purposes and activities to which appellants returned when the Party was reconstituted in 1945. They disclosed a long continuing and persistent attitude consistent with the state of mind charged in the indictment. See *Debs* v. *United States*, 249 U. S. 211, 215; *Williamson* v. *United States*, 207 U. S. 425, 451; *Allis* v. *United States*, 155 U. S. 117; *Wood* v. *United States*, 16 Pet. 342, 360-361."

APPENDIX "B"

Excerpts from the official release of June 20, 1951. (Described as "background material".) (Italics ours.)

> "Israel Amter * * * is a member of the New York State Committee of the Communist Party. In *1919* he became a charter member of the Communist Party and has been acknowledged as one of the leaders since that date. From *1920* to *1923* he was an organizer of the Friends of Soviet Russia in the United States, and in *1922* he was elected to the Central Executive Com-

mittee of the Workers (Communist) Party. He was a member of the National Committee of the Communist Party, USA, from *1922* through *1940*."

"Isidore Begun * * * has been active in the Communist Party since about *1924*."

"He [Alexander Bittleman] arrived in the United States in *1912*. In *1920* he was a delegate to the Underground Convention of the United Communist Party near Kingston, New York, and since that time has been an active member and official of the Communist Party."

"Charney was a Communist Party organizer from *1935* to *1941*."

"Flynn entered the Communist Party in the latter part of *1936* with the first public and formal announcement of this being in February, *1937*."

"She is the National Educational Director of the Communist Party, USA, having been in the Party since *1925*. From *1925* to *1929* she was a member and an organizer as well as the Educational Director of the Young Communist League."

"Gerson joined the Communist Party in *1931*, when he was a textile organizer in the South and has been the Legislative Representative of the New York State Communist Party from 1943 up to the present, except for service in the Army from January 19, 1944, to January 29, 1946. He was a member of the 'Daily Worker' staff from December, *1933*, to January, *1938*, resigning to take a position with the staff of Councilman Stanley M. Isaacs of New York City."

"Jerome joined the Communist Party in the late *1920's* and since that time has been active in the Agitation and propaganda Department."

"Jones has been in the Communist Party since about *1938* and was formerly the Chairman of the New York County Young Communist League and a member of the National Council of the Young Communist League."

"Lannon has been in the Communist Party for nineteen years."

"Perry was admitted to the Communist Party in *1932* and from *1934* to *1936* he was the Executive Secretary of the California-Arizona District of the International Labor Defense."

"Trachtenberg has been extremely active and prominent in the field of Communist publications for more than *25 years.*"

"Weinstock joined the Communist Party not long after his arrival in the United States in *1924* and was the Manager of a Hungarian Communist daily newspaper in *1929* and *1930*. In *1934* he was assigned by the National Committee of the Communist Party to be responsible for work in the trade union field."

APPENDIX "C"

Release of July 26, 1951 ("Background Material") (Italics ours)

"Rose Chernin, who is also known as Rose Kusnitz, has been identified with Communist Party activities since *1929.*"

"Ernest Fox has been identified with Communist Party activities since *1934.*"

"Dorothy Healey became a member of the Young Communist League in *1928*, at the age of 14."

"Steinberg became a member of the Communist Party in early *1937.*"

"Mrs. Yates was a member of the Socialist Party from 1932 to September *1933*, when she joined the Communist Party."

APPENDIX "D"

Release of August 31, 1951 ("Background Material") (Italics ours)

"Carlson joined the Young Communist League in 1931, held a number of positions including that of Editor of "Young Worker," a weekly newspaper, and was head of the League in California in *1937*. He be-

came a member of the Communist Party in *1931* or *1932* and has been Financial Director of the Party in California, State Secretary in Wisconsin and since 1949 has held several Party positions in Los Angeles including that of Educational Director for Los Angeles County."

"Ben Dobbs * * * has been associated with Communist Party activities since *1933*."

"Spector has been connected with Communist activities since *the origin* of the Party in the United States, and spent the period from June, 1930, to July, 1931, in San Quentin Prison after conviction on criminal syndicalism charges in connection with Communist activities."

APPENDIX "E"

(From Volume IV, Official Transcript, February 7, 1952, *Schneiderman* v. *U. S.*, *supra.*)

p. 455

Q. When did you first meet the defendant Oleta O'Connor Yates?
A. I think I met her almost when they first came down from Seattle.
Q. When would that be?
A. Around the latter part of 1935.
Q. Was she a member of the Communist Party?
A. Yes.

* * * * * * * * * *

p. 463

Q. Now then, did you ever attend any schools?
A. Yes.
Q. Conducted by the Communist Party?
A. Yes.
Q. When was the first such school?
A. I think it was the latter part of '37, November.

* * * * * * * * * *

p. 547

Q. Where did you first meet the defendant Ben Dobbs?

A. San Francisco, 1935.
Q. What was he doing then?
A. He was the director of Young Communist League.

. . . . . .

p. 548

Q. Where did you first meet Frank Carlson?
A. In 1935 in San Francisco.
Q. And what was he?
A. He was state director of the Young Communist League.

. . . . . .

p. 552

Q. Where did you first meet Frank Spector?
A. He came out from New York to become the county organizer in San Francisco sometime around—I think around about the first part of 1936. I am not sure of the date.
Q. When did you last see him in the Communist Party?
A. About 1939 or '40; about 1940.

APPENDIX "F"

EXTRACTS FROM GOVERNMENT'S SUPPLEMENTAL MEMORANDUM PERTAINING TO DECLARATIONS MADE PRIOR TO EFFECTIVE DATE OF SMITH ACT. *United States* v. *Wm. Schneiderman, et al., No. 22151-Crim.*

(Filed by Government in reply to defendants' motions to strike testimony concerning CP membership and declarations prior to effective date of Smith Act.)

"Without repeating our previous contentions, we believe that the acts and declarations testified to by the witness Saunders, occurring prior to the effective date of the Smith Act (June 28, 1940), are competent not only on the question of intent, purpose, motive and design, but also as they indirectly tend to shed light upon the association, or con-

certed action of any or all of the defendants that Saunders so testified to (18 U.S.C. 2).

"We believe that a conspiracy *in fact* existed prior to June of 1940.

"We call attention that while the instant indictment was not brought under an earlier statute which denounced conspiring to overthrow the Government by force, still we believe that it can be properly argued that even prior to the effective date of the Smith Act there was in effect a statute which these defendants could have been charged with having conspired to violate, and which statute they were *in fact* and legally conspiring to violate even prior to the effective date of the Smith Act. This section is closely related to the Smith Act. We believe that such a conspiracy would not be separate and apart from the conspiracy to violate the Smith Act; in fact, we believe the same acts, declarations and conduct could be offered in a conspiracy charge to violate either or both of such statutes.

"Said section, which was enacted in 1909, is 18 U.S.C., Section 6. As pertinent, it reads as follows:

> '§ 6. (Criminal Code, Section 6) *Seditious conspiracy.* If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, * * *.' (Repealed June 28, 1940)

"It is true that the present indictment does not charge a violation of this earlier section; however, it well may be argued that the acts and conduct, namely, the unlawful agreement or concerted action of the defendants, were *in fact* a conspiracy in violation of this Act prior to the effective date of the Smith Act."

* * * * *

"It appears to be a well established principle, both in conspiracy cases and others, that evidence of previous actions even though they have a tendency of showing a com-

mission of other crimes are relevant to establish the following factors, namely: Guilty intent, purpose, design or knowledge. This rule is announced in the often referred to case of *Williamson* v. *U. S.*, 207 U. S. 425, where, on page 451 after the court refers to the evidence of previous acts objected to, the court approved their admission and states that such testimony was ' * * * , also competent as tending to establish on the part of the conspirator guilty intent, purpose, design or knowledge.' "

* * * * *

"It is our position, in the instant case, that all facts which tend to shed light; that is, to show association, acts and participation of a similar nature, aiding or abetting, may be received upon the question as to whether or not the declarants and other Party workers were and are co-conspirators of the defendants. This, we believe, is in line with the *Dennis* Opinion, 183 F. 2d 201, at page 231."

* * * * *

APPENDIX "G"

ORAL ARGUMENT LOS ANGELES, MARCH 19, 1952

(Volume 25 Official Transcript—*U. S.* v. *Schneiderman, et al.*, supra)

p. 3467

Mr. Neukom: .... Now, to go further, we believe that the evidence in this case can well show during the course of it and when it is all produced that every person who is a member of the Communist Party, who fully understands its aims and objects, would properly be called a co-conspirator; but, from the matter of practicability and in due consideration of the Katiokis case, where the courts have told us not to have mass prosecutions if we could avoid them, it would be unfeasible and improper to indict every person.

* * * * * * * * * *

p. 3468

Now, I can't entirely agree, although we predicated this indictment under the Smith Act, I still do believe that the previous act which was superseded or which was cancelled by reason of this Smith Act could have been one under which these people could have been conspiring and under which properly they were conspiring to violate even prior to the passage of the Smith Act. That Act I have set up very briefly in our brief here.

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p. 3471

The Court: Is it the Government's theory that this evidence is admissible upon the ground that the same conspiracy existed in 1937 which is charged in the indictment?

Mr. Neukom: Yes, it did. That is our theory because—

The Court: If the theory falls, is the evidence admissible under any other theory?

Mr. Neukom: I think it is admissible under the theory of showing the entire background of the enterprise, even though the conspiracy was not illegal.

The Court: What enterprise, the Communist Party?

Mr. Neukom: Not the Communist Party as such, but the principles that the leaders of the Communist Party advocated through the medium of the Communist Party. The Communist Party—

• • • • • • • • • • •

p. 3472

The Court: Aren't you saying the same thing?

Mr. Neukom: Well, it amounts in a sense to the same thing.

• • • • • • • • • • •

p. 3475

The Court: Is the nature and character of the Com-

p. 3476

munist Party prior to the Smith Act an issue in this case?

Mr. Neukom: I think it is in issue in this case only to this effect: I think it is in issue in this case to show a continuation of the advocacy prior to the passage of the Smith Act, to show that it continued afterwards, because I think this we will agree is elementary: People can be joining right along the line and be responsible for what his co-conspirator did 20 years ago, if they joined the same conspiracy, regardless whether they knew what had really happened.

The Court: But if the same conspiracy did not exist prior to the Smith Act, is there any theory upon which this evidence is admissible?

Mr. Neukom: But, your Honor, our theory is this: That they were teaching and advocating the overthrow of the Government of the United States prior to 1940, and the mere fact that it had not been declared unlawful does not mean that you cannot analyze what was their intent and state of mind prior to that time when the act did become unlawful.

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The Court: Then as I understand it, the Government's theory of admissibility of the pre-Smith Act evidence is that the same conspiracy existed prior to the Smith Act

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as is charged in the indictment.

Mr. Neukom: That is right, although it was not in violation. The second, of course, was not in effect at that time.

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The Court: When the Government offers evidence that the Communist Party in 1937 was conducting a certain school, is that on the theory that the indictment in effect charges, and the Government contends, not only that the conspiracy alleged in the indictment existed prior to the enactment of the Smith Act but also that the Communist Party throughout has been the medium through which the conspiracy operated?

Mr. Neukom: That is right; from its inception. We contend, so far as the Communist Party ever had any strength in this country, or in its inception, we contend that it has advocated these principles that have not had any great change, as your Honor will know, with the exception of certain books and magazines that we have read which are elaborations upon these principles, some of it—and I am using the language

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of Justice Murphy—the most bombastic advocations are contained in this old literature which they give current to. And we contend that these people, the leaders, as distinguished from the rank and file who might well be termed also lesser co-conspirators, but these leaders who have been with it for years and years, and we believe we will show thoroughly understood what their strategy was, as distinguished from their tactics. Your Honor will recall the differentiations the witness made between the strategy, the ultimate goal, and the tactics of popularity, being for this, that or the other movement which was a lure or which might interest people in joining the party.

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The crime here is the conspiracy to advocate the overthrow by force and violence, of course, regardless of

whether it is successful or not. We can show that conspiracy, and if we can show anything which tends to show these continued acts even back prior to 1940, I think we are entitled to have it remain in the record.

The Court: Is that upon the theory, apart from the conspiracy theory, that what the Communist Party did, what the Communist Party stood for, is an issue in the case because the defendants are charged to have operated through

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the Communist Party?

Mr. Neukom: I think that is correct. That is correct if we can show there is a definite tie between these defendants and the others who were functioning at any period that we have adduced testimony on.

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In passing and dropping the point, your Honor, that is an ultimate matter that, of course, the jury will have to determine, and whether they can infer that these declarants were committing an act in furtherance of this conspiracy even prior to 1940, we believe goes to the weight rather than to the admissibility of any of this evidence.

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The Court: As I understand what Mr. Neukom said, it was the government contends the Communist Party teaches and advocates not only during the period of the indictment, but during the period prior to the indictment teaches and

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advocates the duty and necessity of overthrowing the government of the United States by force and violence.

Mr. Neukom: That is correct.[12]

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[12] At page 1410 of the official transcript in the same proceeding (Volume II, February 18, 1952), appears the following statement by the prosecutor:

> "Mr. Neukom: That is our position. In fact, our position is just a common program here. We contended it started back—well, as we said, we were going to hope *to offer evidence back to 1934*, and we certainly would not have had that in mind if we did not feel that there was an identity."
> (Italics ours.)